STATE OF MICHIGAN

IN THE SUPREME COURT

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST ~~AGREEMENT DATED MARCH 7, 1990~~ and LAURENCE G. WOLF, as Trustee and individually,

Plaintiffs/Appellees,

v

CITY OF FERNDALE, MARSHA SCHEER, ROBERT G. PORTER, and THOMAS W. BARWIN,

Defendants/Appellants.

Supreme Court No:

COA No. 262721 op 12/20/05 rec 2/7/06

L.C. No. 03-051450-CK
Hon. Edward Sosnick
Oakland

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APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

CERTIFICATE OF SERVICE

CUMMINGS, McCLOREY, DAVIS & ACHO, PLC
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DATED: MARCH 20, 2006

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NOTICE OF HEARING

TO: **TIMOTHY McMAHON, ESQ**
KICKHAM HANLEY PC
100 Beacon Centre
26862 Woodward Ave
Royal Oak, MI. 48067

PLEASE TAKE NOTICE, that the attached Application for Leave to Appeal will be brought on for hearing before the Michigan Supreme Court on Tuesday, **April 11, 2006** There will be no oral argument unless otherwise ordered by the Court.

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

By: _____
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Dated: March 21, 2006

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QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER THE COURT OF APPEALS CLEARLY ERRED IN FAILING TO APPLY A NARROW CONSTRUCTION OF THE PROPRIETARY FUNCTION EXCEPTION TO GOVERNMENTAL IMMUNITY AS MANDATED BY THIS COURT WHEN IT CONCLUDED THAT PLAINTIFF'S TORTIOUS INTERFERENCE CLAIMS CONSTITUTED ACTIONS FOR "PROPERTY DAMAGE" WITHIN THE EXCEPTION?**

PLAINTIFFS/APPELLEES ANSWER "NO"
DEFENDANTS/APPELLANTS ANSWER "YES"

II. **WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS WHEN PLAINTIFFS FAILED TO MEET THEIR BURDEN OF ESTABLISHING THAT THE PROPRIETARY FUNCTION EXCEPTION APPLIED TO THIS CASE?**

PLAINTIFFS/APPELLEES ANSWER "NO"
DEFENDANTS/APPELLANTS ANSWER "YES"

III. **WHETHER THE COURT OF APPEALS CLEARLY ERRED IN FAILING TO ADDRESS DEFENDANTS' ARGUMENT THAT THE PLAINTIFFS' CLAIMS WERE BARRED BY RES JUDICATA?**

PLAINTIFFS/APPELLEES ANSWER "NO"
DEFENDANTS/APPELLANTS ANSWER "YES"

IV. **WHETHER THE COURT OF APPEALS CLEARLY ERRED IN FAILING TO ADDRESS THE DEFENDANTS' ARGUMENT THAT THE EVIDENCE DID NOT SUPPORT PLAINTIFFS' TORTIOUS INTERFERENCE CLAIMS AS THERE WAS NO TORTIOUS CONDUCT ON THE PART OF THE DEFENDANTS?**

PLAINTIFFS/APPELLEES ANSWER "NO"
DEFENDANTS/APPELLANTS ANSWER "YES"

ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants/Appellants appeal from the Court of Appeals opinion and order reversing the trial court's grant of summary disposition in favor of Defendants. (Apx. 32, Opinion, December 20, 2005).

Defendants/Appellants request this court:

1. In lieu of granting leave to appeal, reverse the Court of Appeals decision and grant the Defendants summary disposition; or, in the alternative;

2. Grant leave to appeal and grant Defendants' summary disposition following full briefing, or, in the alternative;

3. Remand this case to the Court of Appeals for a determination of the other grounds for summary disposition.

STATEMENT OF JURISDICTION AND GROUNDS

The Court of Appeals issued its opinion on December 20, 2005. The jurisdiction of this court rests on MCR 7.301(A)(2).

Appellants seek leave to appeal to this Honorable Court upon very compelling judicial grounds relating to statutory interpretation. In contravention of the basic principle of this state's jurisprudence that the immunity conferred upon governmental agencies is to be construed broadly and that the statutory exceptions are to be narrowly construed, the Court of Appeals applied a broad definition of the term "property damage" within the proprietary function exception. The Court of Appeals conclusion that Plaintiff's tortious interference claims constitute actions for "property damage" based on the broad construction of that term, is clearly erroneous and immediate review by this Court is warranted.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A long history exists between the parties relating to wireless communication towers, both in and out of litigation. Although some of the history may appear to go beyond the scope of Plaintiffs' current claims, it is all relevant to the issues on appeal.

The 1999 Variance Application

Plaintiff, Laurence G. Wolf Capital Management Trust, owns a building (hereinafter "the Building") on the southeast corner of 9 Mile Road and Woodward Avenue in Ferndale, Michigan. (7/28/03 Complaint, attached as Appendix 1). At all relevant times, the Building was located in a C-4 zoning district, which prohibited wireless communication facilities without a variance. On December 17, 1999, Laurence Wolf, as trustee of the Trust, entered into an Option and Lease Agreement with AT&T. (12/17/99 Option and Lease Agreement, attached as Appendix 2).[1] Under the terms of the 1999 Agreement, AT&T had the option to lease space in or on the building, for the installation of wireless communication antennas. (Appendix 2, p 1). AT&T also assumed the responsibility for applying for the zoning variances, special use permits or other governmental approval. (Appendix 2, p 1). However, prior to entering into the 1999 Agreement with the Trust, AT&T had not sought any governmental approval for its antenna. Furthermore, at the time that the Trust entered into the 1999 Agreement with AT&T, Air Touch Cellular Services already had an antenna on the Building.

On November 3, 1999, AT&T submitted an Application for Site Plan Review and Special Use to construct a wireless communications facility at the Building. (Application

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[1] Other than this 1999 Agreement, the Trust never entered into another contract or agreement with AT&T to place wireless communication facilities, including antennas, on the building.

for Site Plan Review and Special Use, attached as Appendix 3). A variance was required since the Ordinance in place at the time of AT&T's application did not allow wireless communications facilities in C-4 zoning districts. See ***Laurence Wolf Capital Mgmt Trust v City of Ferndale,*** 61 Fed Appx 204, 207 (6th Cir 2003)(attached as Appendix 4).

AT&T's application was considered twice by Ferndale's Zoning Board of Appeals – once on December 21, 1999, and again on January 18, 2000. At the January 18, 2000 meeting, the Board denied AT&T's variance, indicating in the meeting minutes that it based its decision on ". . . changes to the character of the neighborhood which would result from construction of the proposed structure, no hardship being justified by the petitioner and the problem being self-created." Id. at 208. On January 27, 2000, the City sent AT&T a letter stating that the variance application was denied because the ordinance "does not permit wireless communication facilities in the C-4 Zoning District . . . ." Id.

The First Lawsuit

On February 11, 2000, the Trust filed its first lawsuit against the City of Ferndale in the Oakland County Circuit Court. (2/11/00 Verified Complaint and Demand for Injunctive Relief, attached as Appendix 5).[2] This lawsuit was based upon the City's denial of AT&T's application for a use variance to install a wireless communication antenna on the Building. The Trust alleged that Ferndale denied the use variance because AT&T allegedly did not meet the requirements for obtaining such a variance. (Appendix 5, ¶ 22). The Trust appealed the City's denial of the application. (Appendix 5, ¶¶ 41-51). The Trust also alleged that the City denied the application in an attempt to usurp the

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[2] ***Laurence Wolf Capital Mgmt Trust*** v ***City of Ferndale***, Oakland Count Circuit Court, Cause No. 00-020893-CZ (Hon. Richard D. Kuhn).

Plaintiffs' business opportunity with AT&T and sought recovery for tortious interference. (Appendix 5, ¶¶ 52-60).

The City filed a Motion for Partial Summary Disposition relating to the Trust's request for injunctive relief seeking approval for a permit or variance to allow the construction of the antenna on the Building. The Court granted the City's motion, affirming the Ferndale Zoning Board of Appeals' decision. (12/22/00 Order, attached as Appendix 6). Subsequently, the Trust's first lawsuit was dismissed in its entirety with prejudice when the Circuit Court ruled that the City was entitled to governmental immunity on the Trust's remaining claims. (6/13/01 Order, attached as Appendix 7). The Trust has never appealed either order.

The Second Lawsuit

Meanwhile, on June 13, 2000, the Trust filed its second lawsuit against the City of Ferndale in Federal Court.[3] In the second lawsuit, the Trust collaterally attacked the City's denial of the variance, alleging that it violated the Telecommunications Act of 1996 by failing to support the denial in writing and with substantial evidence. The Trust also alleged that the City's zoning ordinance violated the Telecommunications Act because it discriminated against providers of functionally equivalent services and effectively prohibited wireless services. See ***Laurence Wolf Capital Mgmt Trust v City of Ferndale,*** 128 F Supp 2d 441 (E.D. Mich. 2000)(attached as Appendix 8).

A bench trial was held on December 5, 2000, during which the parties presented evidence from the Ferndale Zoning Board of Appeals' administrative record. On

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[3] ***Laurence Wolf Capital Mgmt Trust v City of Ferndale***, United States District Court Eastern District of Michigan, Cause No. 00-40225 (Hon Paul V Gadola).

December 18, 2000, the Honorable Paul V. Gadola issued his order in a published opinion. (Appendix 8). Judge Gadola ruled in favor of the City on both of the Trust's claims. Id. at 450. Specifically, the Court found the zoning board complied with the "in writing" and "substantial evidence" requirements under the Telecommunications Act. Id. at 448. The Court also ruled that the zoning ordinance was not discriminatory because it allowed AT&T the opportunity to construct its facility at another site near the building and therefore it did not effectively prohibit the provision of wireless service. Id. at 450. The Trust appealed the Court's Order.

In an April 10, 2003 opinion, the Sixth Circuit Court of Appeals affirmed in part, and reversed in part Judge Gadola's order. 61 Fed Appx 204 (6th Cir. 2003). The Sixth Circuit found that the City had not complied with the Telecommunications Act's "in writing" requirement, because the written record did not contain substantial evidence supporting the zoning board's decision. Id. at 212-13. Additionally, the Sixth Circuit found that the zoning board and the district court had analyzed AT&T's request under the wrong standard: specifically, that AT&T did not need a "use" variance but rather a "nonuse" variance to expand a nonconforming use. Id. at 213-16. The Court of Appeals found that AT&T met the practical difficulty standard for a nonuse variance. Id. at 217-19. In addition, the Sixth Circuit affirmed the district court's determination that the ordinance did not discriminate against functionally equivalent wireless service providers and did not effectively prohibit the provision of wireless services. Id. at 221-22. The case was remanded to the district court.

On remand, the Trust filed a Motion for Entry of Order Requiring Issuance of Non-Use Variance and Disposing of Case. See ***Laurence Wolf Capital Mgmt Trust v City***

of Ferndale, 2004 US Dist LEXIS 9157 (ED Mich 2004)(attached as Appendix 9). The Trust's motion was granted, in part, and the City was ordered to issue a nonuse variance to AT&T for placement of a wireless communications antenna on the Building.

The New Ordinance

Meanwhile, on November 12, 2001, the City adopted an Ordinance amending the City of Ferndale Zoning Ordinance, Section 4.39, Wireless Communication Facilities. (Amended Ordinance, attached as Appendix 10). The Amended Ordinance provides:

> (e) *Permitted use.* The following use is specifically permitted: Wireless communication facilities located on property owned, leased, or otherwise controlled by the City of Ferndale, provided that a license or lease authorizing such antenna or tower has been approved by the City of Ferndale Council.
> (Appendix 10, p 8).

The Amended Ordinance removed the prior prohibition against having multiple wireless communications antennas upon a structure. The Amended Ordinance also allows wireless communications facilities in M-1 and M-2 zoning districts, after administrative review. (Appendix 10, p 9). Additionally, the new ordinance allows wireless communications facilities in C-1, C-2, C-3 and C-4 zoning districts, upon the approval of a special use permit. (Appendix 10, pp 10-11).

Plaintiffs Subsequent Dealings With the City and AT&T

After the enactment of the Amended Ordinance, Mr. Wolf and his attorney met with Thomas Barwin, Ferndale's City Manager, as well as other City officials to discuss the Amended Ordinance. (Deposition of Thomas Barwin, attached as Appendix 11, pp 34-35). During the meeting it was suggested to Mr. Wolf that if he wanted a wireless communication facility on the Building, this was the law and process he would have to follow. (Appendix 11, pp 35-36).

During this time period, AT&T took another look at the Building as a potential wireless antenna site. (Deposition of Lauren Cato - attorney for AT&T, attached as Appendix 12, p 31). AT&T had conversations with Mr. Wolf and his counsel, and there may have been a draft lease. (Appendix 12, pp 37-38, 59). However, no such lease was ever executed. (Appendix 12, p 95).

AT&T ultimately decided it did not want to pursue placing an antenna at the Building. (Appendix 12, pp 92-93). According to AT&T's counsel, the decision was made because Nextel was also considering the Building and AT&T wanted a "sure thing." (Appendix 12, p 33). As a result, AT&T began to look elsewhere. (Appendix 12, p 33). When AT&T was doing research at the City, Marsha Scheer, Ferndale's Director of Community Development Services, mentioned that City property was an option under the amended ordinance. (Appendix 12, pp 33-34).

Ferndale's Lease Agreement With AT&T

On August 7, 2002, after the U.S. District Court's approval of the City's action regarding the variance and prior to the Sixth Circuit's reversal of the decision, the City entered into a Lease Agreement with AT&T which would allow AT&T to place wireless communications fixtures and equipment on City owned property. (8/7/02 Lease Agreement, attached as Appendix 13).[4]

Previously, in March 2002, AT&T contacted the City regarding placing a wireless

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[4] It is important to note that, at the time AT&T entered into the Agreement with the City, the Plaintiffs had been properly denied a variance. This is supported by the state court's dismissal of Plaintiff's first lawsuit (Appendix 7), and the U.S. District Court's findings in favor of the Defendant in the second lawsuit (Appendix 8). Although Plaintiffs appealed the dismissal of the second lawsuit and ultimately prevailed, the order in effect at the time the City entered into the Agreement with AT&T allowed the City to pursue such a contract since the Plaintiff's could not obtain the required variance.

communications facility on City property. (Deposition of Marsha Scheer attached as Appendix 14, pp 24-25). Lauren Cato, counsel for AT&T, met with City administration on March 21, 2002 to discuss possible City owned property locations for AT&T's antenna. (Appendix 12, pp 33-37).

By letter dated March 22, 2002, AT&T proposed that the City "consider a flagpole in the city library lawn or on the municipal parking lot," the interior of which would contain antennas for AT&T and other carriers. (3/22/02 Correspondence, attached as Appendix 15). Three days later, AT&T provided photomontages relating to AT&T's proposal for a wireless communication facility on City property. (3/25/02 Correspondence, attached as Appendix 16).

Prior to the March 22, 2002 correspondence, there were no specific conversations among the City's administrators regarding placing a wireless communications facility on City property. (Appendix 14, pp 27-29, 33; Appendix 11, p 18). Likewise, the City did not contact telecommunications companies to pursue having the wireless communication facilities on City property. (Appendix 11, pp 19-20). Prior to receipt of the March 22, 2002 correspondence, the City had not conducted any research relating to locations for wireless communications facilities on City property. (Appendix 14, pp 29-30).

The City Attorney, P. Daniel Christ of Beier Howlett, P.C., handled the negotiations of the Lease Agreement and other details relating to the transaction. (Appendix 14, pp 69-70). Prior to finalizing the Lease Agreement, AT&T forwarded the following e-mail correspondence to Mr. Christ:

> Please allow this e-mail to serve a confirmation that AT&T Wireless ***does not*** currently have valid executed lease with the Laurence Wolf Capital Management Trust nor with Laurence Wolf regarding the Ferndale Center building at the corner of Nine Mile Road and Woodward Avenue.

(5/17/02 E-Mail Correspondence, attached as Appendix 17)(emphasis added).

AT&T's counsel, Ms. Cato, confirmed that she sent this correspondence in response to a request made by the City, and that its contents were true. (Appendix 12, pp 41-42, 129). It was Ms. Cato's belief that the City wanted this information "to make sure that they were okay to proceed and there wasn't an existing contract . . . to make sure AT&T was free to quote enter into negotiations and an agreement with them and that it did not conflict with an existing agreement." (Appendix 12, p 42).[5]

As a result, the City's Lease Agreement with AT&T was approved by the Ferndale City Council on July 22, 2002. (7/22/02 Ferndale City Council Minutes, attached as Appendix 19).

Plaintiffs' Application for a Special Use Permit for a "Spec Antenna"

Subsequent to the Agreement between AT&T and the City, Mr. Wolf decided that he was going to erect a "spec antenna" on the Building in order to attract wireless communication customers. (Appendix 18, pp 39-40). Once the spec antenna was in place, he planned to contact brokers that deal with wireless communications companies to place antennas. (Appendix 18, p 40). Mr. Wolf did not contact any brokers before initiating the process of designing and constructing the spec antenna. (Appendix 18, p 41).

In order to plan and design the spec antenna, Mr. Wolf engaged the services of architect David Donnellon. Mr. Wolf relied exclusively upon Mr. Donnellon to determine

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[5] Mr. Wolf verified that the information in the e-mail was true. (Deposition of Laurence Wolf, attached as Appendix 18, pp 77-78).

the type of antenna to place on the Building. (Appendix 18, pp 41-42). Mr. Wolf also relied upon Mr. Donnellon to apply for and obtain permits for the antenna. (Appendix 18, p 46).

On August 26, 2002, Mr. Donnellon submitted an Application for Site Plan Review and Special Use Approval to the City. (Application for Site Plan Review, attached as Exhibit 20). When submitting this application, Mr. Donnellon indicated that the wireless communication facility would accommodate up to three carriers, naming Verizon Wireless as the initial company. (8/26/02 Correspondence, attached as Appendix 21). On September 13, 2002, the City responded to the Application, requesting additional information and clarification. (9/13/02 Correspondence, attached as Appendix 22). However, Mr. Wolf later decided to voluntarily drop the application. (Appendix 18, p 75).

Mr. Wolf learned that AT&T had a contract with the City when Mr. Donnellon submitted the August 26, 2002 Application. (Appendix 18, p 46). Mr. Wolf believed that someone on his staff may have contacted AT&T while the August 26, 2002 Application was pending to determine if AT&T wanted to place an antenna on the spec antenna, but could not identify who made the contact. (Appendix 18, pp 48-49). However, Mr. Wolf verified that there have been no negotiations, verbal commitments or contracts exchanged with AT&T regarding space on the spec antenna. (Appendix 18, pp 49-52).

The Third Lawsuit

The Trust filed its third lawsuit against the City of Ferndale on May 21, 2003. (5/21/03 Complaint and Jury Demand, attached as Appendix 23).[6] In its Third Complaint, the Trust alleged that the City was liable under 42 U.S.C. § 1983 for violating Plaintiffs'

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[6] Laurence G. Wolf Capital Management Trust et al v City of Ferndale et al, United States District Court Eastern District of Michigan, Cause No. 03-71976 (Hon. Paul D. Borman).

substantive and procedural due process rights. (Appendix 23, ¶¶ 33-39). The Trust again sought to recover for tortious interference alleging that Defendants denied the special use permit and usurped the Plaintiffs' business opportunity. (Appendix 23, ¶¶ 27-29, 40-51). This Third Complaint was dismissed pursuant to a stipulated order of voluntary dismissal. (Order of Voluntary Dismissal, attached as Appendix 24).

The Fourth Lawsuit

On July 28, 2003, Plaintiffs initiated the present action. (Appendix 1). As in the first and third lawsuits, Plaintiffs again sought to recover under theories of tortious interference. (Appendix 1, ¶¶ 32-43).

On October 7, 2003, the Defendants filed a Motion to Dismiss based upon governmental and absolute immunity. The trial court granted the motion as to Robert Porter, the Mayor of Ferndale, holding that the mayor is the highest elected official and is therefore entitled to absolute immunity. (12/9/03 Order, attached as Appendix 25, p 3). With regard to the other Defendants, the court held that further factual development was necessary. (Appendix 25, p 2-3).

On July 20, 2004, Defendants filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (C)(10). (Motion for Summary Disposition, attached as Appendix 26; Reply Brief in Support of Defendants' Motion for Summary Disposition, attached as Appendix 27). First, Defendants argued that the facts in the case do not support claims of tortious interference with a contractual relationship or tortious interference with a prospective business relationship. Second, Defendants argued that Plaintiffs' claims were barred by governmental immunity. Specifically, that the proprietary function does not apply, and even if it did, Plaintiffs are not seeking recovery for "property damage" as

contemplated by the governmental immunity statute. Third, Defendants argued that Plaintiffs' claims were barred by the doctrine of res judicata.

In response, Plaintiffs argued that they could establish a claim of tortious interference, and could point to specific acts that demonstrate the Defendants' alleged improper motive. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Disposition, attached as Appendix 28). Plaintiffs also argued that the proprietary function was applicable, and therefore the Defendants were not entitled to governmental immunity. Plaintiffs argued that intangible property should be included in "property damage." Finally, Plaintiffs asserted that res judicata was inapplicable.

The trial court granted the Defendants' Motion for Summary Disposition, and issued an Opinion and Order on January 5, 2005. (1/5/05 Order, attached as Appendix 29). The court determined that there were material issues of fact with regard to Plaintiffs' tortious interference claims. (Appendix 29, p 3). With regard to the governmental immunity issue, the court did not determine whether the proprietary function was applicable. (Appendix 29, p 3-4). Instead, the court recognized that the proprietary function exception applies only in cases seeking to recover for bodily injury or property damage, and determined that the issue was whether the loss of a business expectancy is "property damage." (Appendix 29, pp 3-4). The Court held:

> This is an action for prospective economic injury. Clearly this is not an action for bodily injury or property damage. Accordingly, the defendants' motion for summary disposition shall be granted.
> (Appendix 29, p 4).

On January 20, 2005, Plaintiffs filed a Motion for Reconsideration, arguing that damages for tortious interference claims should be considered "property damage" because such claims are allegedly "damages for injuries to . . . property" in the statute

of limitations. (Motion for Reconsideration, attached as Appendix 30). The trial court disagreed, holding that "the Court remains of the opinion that this is not an action for 'bodily injury or property damage' narrowly construed, but is a case for loss of a business expectancy." (4/21/05 Opinion and Order, attached as Appendix 31).

The Court of Appeals reversed the trial court's decision in an opinion issued on December 20, 2005. (Appendix 32). Defendants' motion for reconsideration was denied. (Appendix 33). Defendants have filed the instant application for leave to appeal.

STANDARD OF REVIEW

The appellate court reviews the grant or denial of summary disposition *de novo*. ***Maiden v Rozwood,*** 461 Mich 109, 118; 597 NW2d 817 (1999). Similarly, questions of statutory construction are reviewed *de novo* as a matter of law. ***Sands Appliance Services, Inc. v Wilson,*** 463 Mich 231, 238; 650 NW2d 246 (2000).

Defendants brought their motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). MCR 2.116(C)(7) tests whether the claim is barred because of immunity granted by law and requires consideration of all documentary evidence filed or submitted by the parties. ***Maskery v University of Michigan Bd. of Regents,*** 468 Mich 609, 613; 664 NW2d 165 (2003). All well pleaded allegations are to be accepted as true and must be construed in the light most favorable to the non-moving party. ***Wade v Department of Corrections,*** 439 Mich 158; 483 NW2d 26 (1992). In order to survive a motion for summary disposition under MCR 2.116(C)(7), the plaintiff must allege facts in the complaint justifying application of an exception to governmental immunity. Id. at 163.

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim.

Maiden, supra, at 119. The trial court considers the affidavits, pleadings, depositions, admissions, and other evidence, to the extent that the content or substance would be admissible as evidence in a light most favorable to the non-moving party. Id. at 199-120. Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleading, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. ***Quinto v Cross & Peters Co.,*** 451 Mich 358, 362-363; 547 NW2d 314 (1996). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. Id.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO PREVAIL ON APPEAL BECAUSE THE COURT OF APPEALS DID NOT APPLY A NARROW CONSTRUCTION OF THE PROPRIETARY FUNCTION EXCEPTION TO GOVERNMENTAL IMMUNITY AS MANDATED BY THIS COURT WHEN IT CONCLUDED THAT PLAINTIFF'S TORTIOUS INTERFERENCE CLAIMS CONSTITUTED ACTIONS FOR "PROPERTY DAMAGE" WITHIN THE EXCEPTION.

The governmental tort liability act, ("GTLA"), MCL 691.1401 et. seq. provides government immunity for governmental agencies, including municipalities like Defendants in this case. Governmental immunity is a characteristic of government. ***Mack v Detroit,*** 467 Mich 186, 198; 649 NW2d 47 (2002). Accordingly, to assert a viable claim against a governmental agency, a plaintiff must plead facts that establish an exception to governmental immunity. Id. The immunity afforded governmental agencies is broad and statutory exceptions thereto are narrowly construed. ***Stanton v Battle Creek,*** 466 Mich 611, 617; 647 NW2d 508 (2002).

In this case, the Court of Appeals held that Plaintiffs had pleaded a cause of action

in avoidance of immunity i.e. proprietary function exception when the Plaintiffs alleged that the Defendants tortiously interfered with their established and prospective business relationships.

The Court of Appeals erroneously applied a broad construction of the phrase "property damage" in the proprietary function exception to governmental immunity set forth in MCL 691.1413. The exception provides:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or **property damage** arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. [MCL 691.1413].(Emphasis added).

Based on a "more expansive" definition of the word "property" found in ***63C Am. Jur. 2d Property***, the Court of Appeals determined that the phrase "property damage" includes "injury or harm to one's rights or interests associated with an object." The court then concluded that Plaintiffs tortious interference claims constituted an action for property damage, i.e. the harm or injury to their right of lawful, unrestricted use of their res for the particular business purpose that they have negotiated.

The Court of Appeals erred in adopting this broad definition. This Court held in ***Stanton, supra,*** that when construing the terms of the statutory exceptions to governmental immunity, the Court must apply a narrow definition. In ***Stanton,*** the court was faced with the varying dictionary definitions of the term "motor vehicle" in the motor vehicle exception to governmental immunity. MCL 691.1405. The Court concluded:

> Given these divergent definitions, we must choose one that most closely effectuates the Legislature's intent. Fortunately, our jurisprudence under the governmental tort liability act

> provides an answer regarding which definition should be selected. As previously noted, it is the basic principle of our state's jurisprudence that the immunity conferred upon governmental agency and subdivisions is to be construed broadly and that the **statutory exceptions are to be narrowly construed**. ***Nawrocki v Macomb Co. Rd. Comm.,*** 463 Mich 143, 148; 615 NW2d 702 (2000). Thus, **this court must apply a narrow definition** to the undefined term "motor vehicle." Id. at 618 (Emphasis added).

The phrase "property damage" appears in the same sentence as "bodily injury" whose plain meaning is injury (physical) to the body. By analogy, the phrase "property damage" should be narrowly construed to mean physical damage to the property, i.e. the res or object owned or possessed by a person. In this case, the Plaintiffs do not seek to recover for damage to property. The Plaintiffs are complaining that the City usurped a business opportunity. This is the essence of a constitutional taking claim. The Plaintiffs have already pursued such constitutional claims and have been rejected by the courts.

The Iowa Supreme Court's construction of the undefined term "property damage" in an automobile liability insurance policy supports Defendants' position. In ***Felder v State Farm Mutual Automobile Insurance Co.,*** 494 NW2d 704 (1993) the court held that the term "property damage" means "damage [physical] to tangible property." The court stated:

> We agree with the Louisiana Supreme Court which in an analogous case, said "**property damage" is not defined in the policy, but common sense dictates that it means damage to tangible property** . . . and not consequential losses arising from loss of use or damage to property. Id. Citing ***Boiden Inc v Howard Trucking Company,*** 454 So. 2d 1081, 1090 (La. 1983). (Emphasis added).

The Texas Court of Appeals in ***Amarillo National Park v Terry,*** 658 SW2d 702 (Tex 1983) reached a similar conclusion. The Court construed the term "property damage" in a Texas statute which made parents liable for property damage caused by

the willful and malicious conduct of their child. The Court affirmed judgment in favor of the appellee parents in their suit against appellant bank to recover unauthorized withdrawals from their accounts made by their son. The Court held that the statute was not applicable because the bank suffered economic loss, not property damage. The Court explained:

> In considering the statute as it is, which we are enjoined to do, we must find the legislative intent in its language and not elsewhere giving full effect to all of its terms. And since the Legislature did not specifically define the statutory terms it used, we are to give them the meaning in which they are ordinarily understood. By the terms of the statute, liability is imposed on the parent or other person for "property damage" . . . But, **giving the phrase the meaning in which it is ordinarily understood, there was no property damage** proximately caused by the unauthorized withdrawals of money, for there was no damage inflicted on, much less a destruction of "the money the bank lost." Instead, the **bank suffered only an economic loss. And, therefore, the bank was not caused property damage within the meaning of the statute**. Id at 704. (Emphasis added)

Similarly, in this case, as the trial court correctly determined, the Plaintiffs were seeking recovery for the loss of a business expectancy, not property damage. The trial court stated:

> The specific issue presented is whether the loss of a business expectancy is "property damage." The exceptions to governmental immunity are in derogation of the common law and therefore, are to be strictly construed. . . This is an action for prospective economic injury. Clearly, this is not an action for bodily injury or property damage. Accordingly, the Defendants' motion for summary disposition shall be granted. (Appendix 29, p. 4).

This Court should reject the Court of Appeals attempt to give an expansive definition to a term within the proprietary function exception to governmental immunity

contrary to the well established precedent of this Court requiring a narrow construction of such terms.

II. DEFENDANTS ARE ENTITLED TO PREVAIL ON APPEAL BECAUSE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF ESTABLISHING THAT THE PROPRIETARY FUNCTION EXCEPTION APPLIED TO THIS CASE.

A proprietary function is the "anti-thesis of a governmental function itself." See ***Harris v Michigan Board of Regents,*** 292 Mich App 679, 691; 558 NW2d 225 (1996). Once the governmental function analysis is made and it has been determined that the activity has the indicia of a traditional governmental function, the conclusion is virtually inevitable that the activity in question is not proprietary. Id at 692.

In this case, the Defendants were engaged in the enforcement of a City ordinance which is a quintessential governmental function. ***Randall v Delta Charter Township,*** 121 Mich App 26, 30; 328 NW2d 562 (1982).

Furthermore, the Plaintiffs have the burden of establishing that the Defendants were engaged in a proprietary function for purposes of the proprietary function exception to governmental immunity. ***Harris, supra.*** As statutorily defined, a proprietary function means that an activity is not a governmental function because the primary motive is to make a profit and is one not normally supported by taxes or fees. Id.

Plaintiffs failed to meet their burden of producing evidence establishing that Defendants were engaged in a proprietary function. Clearly, the Plaintiff did not allege facts justifying the application of the proprietary function to governmental immunity. The Plaintiffs' tortious interference claims do not constitute an exception to governmental

immunity. See ***Smith v Dep't of Public Health,*** 428 Mich 540; 410 NW2d 749 (1987)(holding that there is no intentional tort exception to governmental immunity.) Therefore, the Court of Appeals erred in reversing the trial court's grant of summary disposition in favor of Defendants based on governmental immunity.

III. DEFENDANTS ARE ENTITLED TO PREVAIL ON APPEAL BECAUSE THE COURT OF APPEALS FAILED TO ADDRESS DEFENDANTS' ARGUMENT THAT THE PLAINTIFFS' CLAIMS WERE BARRED BY RES JUDICATA.

The doctrine of res judicata bars a subsequent action between the same parties where the evidence or the essential facts are identical. ***Sewell v Clean Cut Mgmt, Inc***, 463 Mich 569, 575; 621 NW2d 222 (2001). For res judicata to apply:

> (1) the prior action must have been decided on its merits; (2) the matter contested in the second case was or could have been resolved in the first; and (3) both actions involved the same parties or their privies.
>
> ***J.A.M. Corp v AARO Disposal, Inc,*** 461 Mich 161, 166-67; 600 NW2d 617 (1999).

Michigan has adopted a broad rule of res judicata, barring "not only claims actually litigated in the prior actions, but every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Id. Whether the doctrine of res judicata applies is a question of law for the Court to decide. ***Pierson Sand & Gravel, Inc v Keeler Brass Co***, 460 Mich 372, 379; 596 NW2d 153 (1999).

In the case at bar, Plaintiffs rely on their dealings with AT&T prior to the November 2001 Amendment to the zoning ordinance. Issues relating to the denial of the variance sought by AT&T in 1999 and 2000, were or could have been litigated in the first or second lawsuit filed by Plaintiffs.

In the first lawsuit, Plaintiff alleged that the Zoning Board of Appeals denied a use

variance to AT&T to construct an antenna on Plaintiff's Building, because "it would rather have the antenna built on City property . . . ." (Appendix 5, ¶ 33). Plaintiff alleged that the City tortiously interfered with its business relationship because it "intentionally and improperly interfered with the contracts and business relationships and expectancies between Plaintiff and AT&T . . . primarily for the purpose of producing a pecuniary profit for the City of Ferndale." (Appendix 5, ¶¶ 56-58). On June 13, 2001, the trial court granted Defendant's Motion for Summary Disposition, and dismissed Plaintiff's Complaint with prejudice. (Appendix 7).

Likewise, in the case at bar, Plaintiffs have alleged that it had a business relationship with AT&T, and that Defendants "intentionally, purposefully and willfully interfered with the business relationship or expectancy between Plaintiffs and AT&T." (Appendix 1, ¶¶ 32-37). To the extent that Plaintiffs rely on a relationship with AT&T that allegedly existed back in 1999 and 2000, Plaintiffs' claims of tortious interference have already been litigated. The trial court in the first lawsuit found that there was no merit to Plaintiff's claim against the Defendant, and dismissed the case with prejudice.

In addition, it is undisputed that the Ferndale Zoning Board has only considered one site plan review requesting a variance for the Building, and that the site plan review was submitted by AT&T on November 3, 1999. It is also undisputed that the only agreement entered into between Plaintiffs and AT&T was the December 17, 1999 Lease Agreement.

As this Court recently explained in ***Adair v State of Michigan***, 470 Mich 105, 124-25; 680 NW2d 386 (2004), Michigan follows the broad transactional test for res judicata. Under the transactional test, the determinative question is whether the claims in the

instant case arose as part of the same transaction as did the claims in the previous actions. "Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . ." ***Adair, supra*** at 125 (citations omitted).

In the case at bar, Plaintiffs' claims relating to AT&T in this and all other litigation have the same origin: the 1999 Lease Agreement, submission of the site plan and review in 1999, and denial of the variance. (Appendix 1, ¶ 11). Therefore, Plaintiffs' tortious interference claims relating to its relationship with AT&T are barred under the transactional test.

IV. DEFENDANTS ARE ENTITLED TO PREVAIL ON APPEAL BECAUSE THE COURT OF APPEALS FAILED TO ADDRESS THE DEFENDANTS' ARGUMENT THAT THE EVIDENCE DID NOT SUPPORT PLAINTIFFS' TORTIOUS INTERFERENCE CLAIMS AS THERE WAS NO TORTIOUS CONDUCT ON THE PART OF THE DEFENDANTS.

In order to establish tortious interference, the Plaintiff must plead and prove the "intentional doing of a per se wrongful act . . . for the purpose of invading the contractual rights or business relationship of another." ***CMI International Inc. v Internet International Corp.***, 251 Mich App 125, 131; 649 NW2d 808 (2002). A "wrongful act per se" is one that is inherently wrong or can never be justified under any circumstances. ***Prysak v R. L. Polk Co.,*** 193 Mich App 12-13; 483 NW2d 629 (1992).

The facts before the court do not establish that Defendants did anything tortious. At the time the City negotiated and entered into the lease agreement with AT&T, the U.S. District Court (per Judge Gadola) had ruled that the City's denial of the requested

variance to enable AT&T to place a wireless communication antenna on the Plaintiff's building was lawful and did not violate the Telecommunications Act of 1996. 47 U.S.C. §332. See ***Lawrence Wolf Capital Management Trust v City of Ferndale***, 128 F Supp 2d 441 (E.D. Mich. 2000). Discussions and negotiations relating to the lease agreement began in March, 2002. The lease agreement was executed in August, 2002. The Sixth Circuit did not reverse the federal district court's decision until April 10, 2003. Judge Gadola's December 18, 2000 decision upholding the city's denial of the variance was in place throughout the time that the lease agreement was discussed and negotiated.

Defendants' discussions and negotiations with AT&T were not tortious but were justified in light of Judge Gadola's December 18, 2000 decision. Based upon that decision, the City Zoning Board had appropriately denied AT&T's application for a variance relating to the use of the building. AT&T was free to pursue other locations for a wireless communications facility, including city property. Defendants, likewise, were free to discuss and negotiate the lease agreement with AT&T without fear of encroaching upon any relationship between Plaintiffs and AT&T based upon the 1999 agreement. Defendants did not act tortiously; rather, their actions were justified under Judge Gadola's December 18, 2000 decision. Therefore, Plaintiffs failed to produce sufficient evidence in support of their claims to withstand Defendants' motion for summary disposition.

Defendants/Appellants gave the Court of Appeals an opportunity to reconsider this and other issues not addressed in the Court's December 20, 2005 opinion. But the Court of Appeals refused, and instead rested its decision solely on the interpretation of the term "property damage" in MCL 691.1413.

RELIEF REQUESTED

WHEREFORE, Defendants/Appellants, CITY OF FERNDALE, MARSHA SCHEER, ROBERT PORTER AND THOMAS BARWIN, respectfully request this Honorable Court:

1. In lieu of granting leave to appeal reverse the Court of Appeals decision and grant Defendants summary disposition, or, in the alternative;

2. Grant leave to appeal and grant Defendants summary disposition following full briefing, or, in the alternative;

3. Remand this case to the Court of Appeals for a determination of the other grounds for summary disposition.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

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